Filed 8/28/09 (Original published opn. filed 7/31/09; *this supp. opn. is not certified for publication* and may not be cited or relied on under Cal. Rules of Court, rule 1115. Because it modifies an otherwise published opinion, this supp. opn. has been posted with the published opinions to facilitate tracking subsequent history of the 7/31/09 opn.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GRIFFIN DEWATERING CORPORATION, Plaintiff and Respondent, v. NORTHERN INSURANCE COMPANY OF NEW YORK, Defendant and Appellant.	G036896 (Super. Ct. No. 00CC04293) SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

I. *Supplemental Opinions on Denial of Rehearing*

California reviewing and appellate courts have found it useful, on occasion, to issue supplemental opinions explaining why they were denying rehearing, and indeed have done so since 1906. (See *National Bank v. Los Angeles etc. Co.* (1906) 2 Cal.App.

659.)[1] In the present case, several factors prompt this supplemental opinion. The petition for rehearing cites two "new" authorities. It also provides a long list of "facts" it says should have been mentioned in the opinion. And we have also received a request for modification from an accountant (who does not otherwise appear to be connected with the case), who, in that request, reveals that he misunderstands our original opinion. He thinks we said that the insurer "did not breach the insurance policy."

We issue this supplemental opinion to deal with "new" authorities, the proffered new "facts," as well as make clear (now) that the insurer breached the policy; it just didn't breach it *unreasonably*.[2]

II. "*New*" *Authority*

The rehearing petition cites us to two "new" authorities, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723 (*Wilson*) and the as-yet unfinal *Bosetti v. U.S. Life Ins. Co. in The City of New York* (2009) 175 Cal.App.4th 1208 (*Bosetti*).

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[1] Among the reasons found in the case law for issuing a supplemental opinion include:

(1) *To address "new" authority raised by the petition for rehearing, particularly authority which the party seeking rehearing has assumed the court has overlooked*. (E.g., *Estate of Watkins* (1940) 16 Cal.2d 793, 799 [supplemental opinion to explain why a certain prior decision, not mentioned in the original opinion, was not overruled by the present case, and that any "apparent conflict" in the language of the two cases was the result of dicta in the prior decision]; *National Bank v. Los Angeles etc. Co., supra,* 2 Cal.App. 659, 662-663 ["our attention is called by petition to the decision" to a certain prior decision "which it is assumed had escaped our attention"].)

(2) *To address facts or parts of the record which, in the wake of the court's original opinion, now appear to have particular significance*. (E.g., *Pacific Finance Corp. v. City of Lynwood* (1931) 114 Cal.App. 509, 516 [in rehearing petition, counsel pointed out that "filed opinion ignores" certain stipulations regarding a certain ordinance, and explaining why the original opinion did not need to address their effect].

(3) *To address an important argument that genuinely was overlooked in the original opinion, but which, all things considered, does not require a rehearing.* (E.g., *Keyes v. Nims* (1919) 43 Cal.App. 1, 15 ["The failure to consider the question of interest was purely an oversight, and, as it should have been considered, but we do not see the necessity of granting a rehearing for that purpose, and we will, therefore, consider and dispose of the point on this application without ordering a rehearing."].)

(4) *To clear up any misunderstanding of the original opinion*. (E.g., *Sutphin v. Speik* (1940) 15 Cal.2d 195, 204 [supplemental opinion to address a characterization of the original opinion which was not accurate].)

(5) *To exercise its discretion to address the new points raised by the petition for rehearing in a separate document.* (E.g., *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 495 ["While we do not ordinarily consider arguments made and authorities cited for the first time in a petition for rehearing, we deem it appropriate to do so in this instance."].)

[2] The request for modification requested that the opinion say whether the CGL policy at issue was an occurrence-based policy or a "claims made" policy, because "the answer to that question affects this court's determination that [the insurer] did not breach the insurance policy."

Our opinion most certainly did not determine that the insurer here did not "breach" the policy. We said that the insurer *did* breach the policy. (See slip op. at pp. 16-17.) We simply said that it did not breach it *unreasonably*. Because the insurer relied on the pollution exclusion to (initially) deny a request for a defense, and not on any timing issue, it is irrelevant whether the policy was an occurrence policy or a claims made policy.

Neither case is apposite, since both are explorations of the genuine dispute doctrine. (See *Wilson, supra,* 42 Cal.4th at pp. 723 [explaining why insurance company could not obtain summary judgment under genuine dispute defense where insurance company claimed that 21-year old plaintiff in an uninsured motorist case had a preexisting degenerative disk disease]; *Bosetti, supra,* 175 Cal.App.4th at pp. 1235-1241 [explaining why insurance company *was* entitled to summary adjudication of bad faith claim against it under genuine dispute doctrine].) And as we said in the original opinion, we do not address *at all* any arguable applicability of the genuine dispute doctrine to the case.

Moreover, neither *Wilson* nor *Bosetti* purports to change the rule that a request for a defense in a *third party* (liability) insurance policy is evaluated at the time the request is made, in light of the facts of the complaint against the insured and other facts known by the insurance company, in light of the potentiality rule.

III. *New "Facts"*

To read the petition for rehearing, one would almost believe that we had decided a different case. On pages 9 through 13 of the petition for rehearing appear a long list of "facts" that the insured says should, at least, have been included in the opinion. The gravamen of these "facts," at least according to the petition, is that the insurer "knew" (the word is used no less than eight times) from the inception of the policy that the total pollution exclusion in its policy would not exclude the company's liability for any sewage claims, and its employees readily admitted as much.

Preliminarily, it should be noted that almost all the "facts" which the petition for rehearing lists came from evidence developed *after* the trial court had ruled in a pre-trial motion in limine that the insurer had breached the insurance contract unreasonably as a matter of law. Those facts were *not* put before the trial judge in that fateful motion. Most of the evidence supporting them was developed as a part of the insurer's *punitive* damages case, which went to the jury with the express understanding that the insurer breached the insurance policy unreasonably. Thus the *most* that might be made of these facts would be some sort of remand; the judgment (based on the in limine ruling) still could not stand.

However, it turns out that the list of "facts" contains some serious errors. The record references do not support the "facts" as framed in the petition for rehearing.[3]

In an appendix to this supplemental opinion, we go through each of the 16 proffered "facts," and explain how each one is either (a) irrelevant to the basic question of whether the insurer was reasonable when, for a time, it declined to defend the insured against the district's suit for indemnity, or (b) is an incorrect statement of the record. The appendix in most cases sets forth the actual transcript verbatim.

We give one example right now. The petition for rehearing states as a "fact" this: "Northern knew the pollution did not bar coverage for the property damage claim by South Coast because Lynch [one of the insurer's employees] testified, a sewage spill inside a house ('in your basement') was not an excluded 'pollutant' because 'it wasn't something that was polluting the environment.' (15 AA 3625)." (Rehr. pet. at p. 9.)

But if one checks pages 3625 and 3626 of volume 15 of the Appellant's Appendix, one merely finds testimony acknowledging that there was in-house *discussion* among the insurer's employees concerning the applicability of the pollution exclusion to sewage claims and that some employees *disagreed* with others on the topic. That hardly shows the insurer itself "knew" there was coverage. It only shows in-house debate. Moreover, the record reference for what "Northern knew" is to testimony elicited in the context of a question that explicitly did not seek any "legal binding [*sic*] on anybody."

In any event, all the proffered facts (whether accurate statements of the record or not) are irrelevant because, as the court stated in *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865, opinion evidence is irrelevant to the interpretation of an insurance policy. Under the heading (directly apropos to the petition for rehearing here): "Admission of Liability by Insurer's Employees Does Not Establish

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[3] Needless to say, the petition for rehearing did not heed our advice in footnote 7 of the original opinion that readers often need the actual source material to check whether a characterization or paraphrase is valid. And providing supporting text would have been particularly easy in this case, where the record has been put on compact disc. Not every reader wants to take the writer's word for it.

Liability," the *Chatton* court said: "Respondents' final argument that there was coverage for advertising injury under the terms of the CGL policy because National Union's *employees themselves admitted the existence of such liability* requires but a brief reply. It is well settled that the interpretation of an insurance policy is a legal rather than a factual determination [citations]. Consistent therewith, it has been held that opinion evidence is completely irrelevant to interpret an insurance contract. [Citations.]" (*Chatton, supra*, 10 Cal.App.4th at p. 865, original italics deleted, italics added .)

As the appendix shows, there were no actual admissions of liability in the case before us. Thus, *Chatton*, where there *were* admissions, applies a fortiori.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.

Appendix to Supplemental Opinion on Denial of Rehearing

There are 16 "facts" which the petition for rehearing says should have been in the original opinion. In this appendix we set out verbatim (with one long exception, there mostly verbatim) the entirety of each "fact," and then explain why the "fact" was not in the original opinion. In most cases we have set out in the margin the actual testimony or language from the record to which the petition for rehearing refers, erring (alas, to the detriment of yet more trees) on the side of inclusiveness.

1. *Fact as framed in the petition for rehearing*: "Northern knew it was insuring Griffin's operations, including its sewage by-pass operations, against claims and lawsuits alleging property damage, as evidenced by (1) Northern inspecting Griffin's operations in 1993 and 1995 during and after its underwriting process and (b) [*sic*] describing Griffin's covered 'operations' on the first page of Northern's policy (AA 4032) as those of a 'sewer contractor.' (16 RT 3068, 3071)."

Reason not included in the original opinion: The record references are to the testimony of the insured's expert. The testimony of a party's bad faith *expert* that the *expert* thought a policy should cover sewage "operations"[4] does not establish that the

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[4] Beginning on page 3068:

"Q. OKAY. AND WHAT'S *YOUR UNDERSTANDING* OF THE POLICIES THAT GRIFFIN BOUGHT AND THE PURPOSES FOR THE PURCHASE OF THOSE POLICIES TO PROTECT IT IN ITS OPERATIONS?

"A. WELL, THERE WERE TWO POLICIES THAT I FOCUSED UPON. ONE WAS THE GENERAL LIABILITY POLICY THAT WAS PURCHASED BY GRIFFIN FROM NORTHERN INSURANCE COMPANY. THEY HAD ACTUALLY PURCHASED THAT POLICY ORIGINALLY IN 1993, AND IT WAS WITH THE EXPECTATION THAT THEY WOULD HAVE COVERAGE FOR THEIR OPERATIONS, WHICH WERE DESCRIBED BY STANDARD INDUSTRIAL CLASSIFICATION CODE ON THE POLICY, THE '96 POLICY AT ISSUE, AS A SEWER CONTRACTOR. SO THE EXPECTATION IS IS THAT NORTHERN WAS PROVIDING COMPREHENSIVE GENERAL LIABILITY INSURANCE, MEANING LIABILITY ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE CAUSED BY THEIR OPERATIONS THAT WOULD NOT OTHERWISE BE EXCLUDED BY THE POLICY. AND SO THE UNDERSTANDING OF -- OF THAT POLICY AND ITS TERMS AND CONDITIONS AND ITS EXCLUSIONS *WAS CONFIRMED, IF YOU WILL, BY WILLIAM HARRISON, AS GRIFFIN'S BROKER*, AND HE HAD THE ASSURANCE AND UNDERSTANDING FROM THE NORTHERN INSURANCE COMPANY PEOPLE AND *HIS UNDERSTANDING* OF THE POLICY THAT POLLUTION EVENTS THAT WERE NOT OF A TRADITIONAL ENVIRONMENTAL NATURE WOULD BE COVERED UNDER THE NORTHERN POLICY. THE KIND OF EVENT THAT IS CONSIDERED TO BE A POLLUTION EVENT WHERE THERE IS DAMAGE TO THE ENVIRONMENT, MEANING WATER, SOIL, OR AIR, IS SUBJECT TO A DIFFERENT KIND OF COVERAGE, A DIFFERENT TYPE OF POLICY. SO IN 1996, HARRISON ARRANGED TO PURCHASE FROM THE A.I.G. -- AMERICAN INTERNATIONAL GROUP AND THEY ARE KNOWN AS A.I.G. TODAY

insurer "knew," at least prior to the *MacKinnon* decision, that sewage claims were not within the purview of the policy's pollution exclusion. Also, the opinion of an expert is not relevant to establish coverage as such. (See *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 ["opinion evidence is completely irrelevant to interpret an insurance contract"].)

2. *Fact as framed by the petition for rehearing*: "Vanetta Smiley, Northern's adjuster (who participated in denying Griffin a defense), knew that 'the building of sewer bypasses was considered an operation for which Northern was insuring Griffin.' (15 AA 3649 (Depo. P. 370:1-6))."

-- AN ENVIRONMENTAL IMPACT LIABILITY POLICY THAT WOULD PICK UP THE RESPONSIBILITY FOR LIABILITY ARISING OUT OF POLLUTION EVENTS.

"Q. OKAY. SO DO YOU HAVE AN UNDERSTANDING OF WHY MR. HARRISON PURCHASED OR INSTRUCTED GRIFFIN TO PURCHASE BOTH OF THOSE POLICIES?

"A. MY -- *MY UNDERSTANDING* WAS IT WAS TO GIVE NORTHERN INSURANCE COMPANY THE COMFORT THAT THE REMEDIATION ACTIVITIES OF GRIFFIN -- BECAUSE IT WAS -- HAD SEVERAL DIFFERENT ENTITIES, AND ONE OF THEM WAS A REMEDIATION COMPANY, WHICH CLEARLY, IN MY MIND AT LEAST -- AND CERTAINLY IT WAS APPARENT IN HARRISON'S MIND -- CREATED AN ENVIRONMENTAL IMPACT LIABILITY EXPOSURE. WHAT HE WANTED TO DO, AS I UNDERSTAND FROM HIS TESTIMONY, WAS TO MAKE CERTAIN THAT GRIFFIN WOULD BE COVERED UNDER THIS SEPARATE ENVIRONMENTAL IMPACT LIABILITY POLICY IN THE EVENT THAT ANY OF ITS EMPLOYEES OR SO FORTH WERE INVOLVED IN THE REMEDIATION ON BEHALF OF GRIFFIN REMEDIATION. AND IT GAVE THEM, MEANING NORTHERN, THE COMFORT THAT THEY COULD HAVE THE T.P.E., THE TOTAL POLLUTION EXCLUSION, ENDORSEMENT ATTACHED TO THE POLICY AND THAT A TRADITIONAL ENVIRONMENTAL IMPACT CLAIM WOULD NOT BE COVERED UNDER THEIR POLICY." (Italics added.)

And beginning on page 3070 and quoting all of page 3071:

"Q. CAN YOU EXPLAIN IN A LITTLE MORE DETAIL WHAT THE PURPOSE OF AN S.I.C. -- IS IT A SIC CODE OR AN S.I.C. CODE? HOW DO YOU REFER TO IT?

"A. I'VE HEARD IT USED BOTH WAYS. I THINK MOST AGENTS AND BROKERS AND UNDERWRITERS WOULD CALL IT THE S.I.C. CODE.

"Q. AND CAN YOU TELL US WHAT PURPOSE IT SERVES IN THE UNDERWRITING CONTEXT?

"A. WELL, IT DEFINED THE OPERATIONS AS THE UNDERWRITERS UNDERSTOOD IT, AND THE INDUSTRIAL CLASSIFICATION FOR 1623 IS SEWER CONTRACTOR.

"Q. OKAY. SO IS IT THEN FAIR TO SAY THAT IN ISSUING THIS POLICY, NORTHERN HAD A CLEAR UNDERSTANDING OF WHAT GRIFFIN'S BUSINESS OPERATIONS WERE --

"A.WELL --

"Q. -- AT LEAST IN CONNECTION WITH WORKING ON SEWER LINES?

"A. NOT ONLY THAT, THEY HAD PERFORMED INSPECTIONS OF GRIFFIN'S OPERATIONS BACK IN '93 AND AGAIN I BELIEVE IT WAS, MEMORY SERVES ME, '95. SO THEY NOT ONLY CLASSIFIED IT AS A SEWER CONTRACTOR, THEY HAD INSPECTIONS PERFORMED BY THEIR LOSS CONTROL PEOPLE TO DETERMINE THE EXACT OPERATIONS, SCOPE OF THEIR OPERATION, THINGS OF THAT NATURE. SO IN MY VIEW, THEY HAD A CLEAR UNDERSTANDING OF WHAT THE OPERATIONS OF GRIFFIN AND ITS RELATED ENTITIES WERE."

Reason not included in the original opinion: The record reference merely shows that at the *time of the deposition* Smiley only acknowledged that sewage bypasses were an "operation for which" the insurer "was insuring" the insured.[5] It is not an admission that, at the time the decision was made in 1999, Smiley thought the pollution exclusion could not apply to a sewage claim.

3. *Fact as framed by the petition for rehearing*: "Jerrie Lynch (Northern's underwriter on Griffin's policy and Mike Bernath (the author of Northern's underwriting guidelines) believed sewage was not a pollutant, thereby raising the 'potential' that the claim was covered, obligating Northern to defend Griffin. (16 RT 3186-87)"

Reason not included in the original opinion: The record references to pages 3186-3187 show that the insured's *expert* believed that a particular employee of the insurer named Speers made the decision to deny coverage maybe -- or maybe not (the witness tried to qualify his answer) in consultation with another employee of the insurer named Bernath.[6] To be charitable to the petitioner, it is possible that the petition also refers to testimony on the preceding page, in which the expert noted that different employees of the insurer had different views on the application of the pollution exclusion to sewage claims,[7] which disagreement was apparently resolved by Speers (or maybe

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[5] "Q. Okay. *Based on our discussions today and yesterday* with regard to the sewer bypass work that was done by Griffin in connection with the Waters claim in the South Coast lawsuit, do you have any understanding that the building of sewer bypasses was considered an operation for which Northern was insuring Griffin?
"A. I would assume so." (Italics added.)

[6] Westin's testimony was:
"YOUR TESTIMONY IS THAT MS. SPEER JUST WENT OFF ON HER OWN, MADE THIS DECISION ALL BY HERSELF. IS THAT YOUR TESTIMONY?
"A. THAT'S MY TESTIMONY.
"Q. BUT YOU'RE AWARE, AREN'T YOU, THAT MS. SPEER AND MR. BERNATH CONSULTED ON THIS ISSUE AND HAD CONVERSATIONS ON THIS TOPIC; ISN'T THAT SO?
"A. THAT'S SO.
"Q. SO SHE DIDN'T JUST GO OFF ON HER OWN, SHE CONSULTED WITH BERNATH, RIGHT?
"A. MAY I EXPLAIN WHAT I MEAN BY OFF ON HER OWN?
"Q. NO. JUST ANSWER MY QUESTION, PLEASE.
"A. THE ANSWER IS YES.

[7] "Q. DOES AN INSURANCE COMPANY HAVE THE *RIGHT TO RESEARCH INTERNAL DISAGREEMENT* WITH RESPECT TO HOW ITS POLICY SHOULD BE INTERPRETED?
"A. THEY HAVE THE RIGHT TO COME TO A DECISION AS TO HOW THEY'RE GOING TO HANDLE THESE MATTERS, *THAT'S CORRECT.*

Speers and Bernath together) unilaterally. Just because one employee of an insurance company may believe that there is coverage does not necessarily make a denial of coverage *unreasonable*, a point that the expert appeared to concede in his answer to an insurance company's right to "internal disagreement."

4. *Fact as framed by the petition for rehearing*: "Northern knew the pollution exclusion did not bar coverage for the property damage claim by South Coast because, as Lynch testified, a sewage spill inside a house ('in your basement') was not an excluded 'pollutant' because 'it wasn't something that was polluting the environment.' (15 AA 3625)."

Reason not included in the original opinion: We quote from all of page 3625 of the Appellant's Appendix and into much of page 3626 in the margin.[8] Lynch's

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"Q. YOU SAW IN YOUR REVIEW OF THE FILE THAT THAT'S EXACTLY WHAT THEY DID HERE, ISN'T THAT CORRECT, THEY HAD AN INTERNAL DISAGREEMENT AND THEY RESOLVED IT?

"A. I DON'T KNOW THAT THERE WAS ANY DIALOGUE GOING ON. IT SOUNDS TO ME LIKE THE DECISION WAS MADE UNILATERALLY BY SPEER, THAT SHE WENT UP TO LYSAUGHT TO GET A VALIDATION AND LYSAUGHT SAYS THERE'S NOTHING COMPELLING HERE, DENY IT.

"Q. YOU RECALL THAT MS. SPEER ACTUALLY CONSULTED WITH THE PEOPLE IN THE UNDERWRITING GROUP ABOUT THIS DIFFERENCE OF OPINION ON THE POLLUTION EXCLUSION?

"A. WELL, THERE WAS OBVIOUSLY SOME DISCUSSION BECAUSE SOMEBODY AT SOME POINT IN TIME TURNED LYNCH AROUND AND CONVINCED HIM THAT HE WAS WRONG.

"Q. THERE WAS ANOTHER UNDERWRITER NAMED MIKE BERNATH. DO YOU REMEMBER HIM?

"A. BERNATH WROTE THE UNDERWRITING GUIDELINES, AS I RECALL.

"Q. BERNATH WAS ANOTHER INDIVIDUAL THAT BELIEVED THAT SEWAGE SHOULD NOT BE INTERPRETED TO BE A POLLUTANT. DO YOU REMEMBER THAT?

"A. THAT'S CORRECT.

"Q. SO THERE WAS LYNCH AND BERNATH THAT WERE BOTH ON THE SIDE THAT WAS OPPOSITE TO MS. SPEER'S VIEW, RIGHT?

"A. THAT'S EXACTLY WHAT'S TROUBLING ME, COUNSEL." (Italics added.)

[8] "Q. Okay. Mr. Lynch, can you tell me a little bit about your employment history? And why don't we start with the last position you held. Who did you work for?

"A. I worked for The Maryland.

"Q. Okay.

"A. Yeah, I worked for The Maryland.

"Q. What years?

"A. Oh, from 1958 till 1998. Forty years.

"Q. What was the last position you held with The Maryland?

"A. Director of Large Accounts.

"Q. What were your duties as the Director of Large Accounts?

"A. Handled accounts beyond $500,000 in annual premium. For many of those years it was all lines of business and all types of business. The last five years or so it was just contracting accounts.

"Q. Okay. Mr. Lynch, do you have a recollection of whether or not at any time during your employment with the company that sewage was not considered a pollutant?

"BY MR. WILLIAMS: By whom? By the company?

testimony simply shows that insurance company employees can disagree with each other. We know of no law that says that if an insurance company employee thinks that an exclusion might not apply to a given situation that that means any position to the contrary on the part of the insurance company is necessarily unreasonable.

5. *Fact as framed in the petition for rehearing*: "Northern knew that 'the underwriting intent of putting the total pollution exclusion endorsement on the policy was so that Northern would be protected against certain environmental risks or harms associated with Griffin *Remediation* Company" (13 RT 2590, ital. added) a sister company of Griffin Dewatering Corporation. Indeed, *Northern* insisted on including the total pollution exclusion in the policy for that purpose. (13 RT 2592) Northern knew the pollution exclusion was not intended to exclude coverage for Griffin Dewatering's sewage –related claims (*id*.) but to exclude claims related to Griffin Remediation's activities (13 RT 2686) since those activities presented 'environmental [matters] that could trigger pollution claims.' (13 RT 2646-47)."

Reason not included in the original opinion: The record references to pages 2590 through 2592 are to the testimony of William Harrison, the insured's broker.

"BY MR. CRONIN: By the company.
"By MR. WILLIAMS: By the courts?
"By MR. CRONIN; By the company.
"By MR. WILLIAMS: By underwriting?
"A. There was *a lot of discussion* about sewage by a lot of people.
"Q. Is it fair to say some people in underwriting took the position, and again I don't mean to attribute any legal binding upon anybody attribute [sic], took the position that sewage was not a pollutant while some people took the position sewage is a pollutant?
"A. There were *people on both sides of the issue*.
"Q. Okay. So were policies written that some underwriters believed covered the risk of sewage spills, just like some underwriters wrote policies that believed, perhaps, that sewage spills were excluded?
"A. It would depend on what the sewage thing is that you're talking about. If your plumber worked on your house and he messed up your sewer line and you've got stuff in your basement some people might — in fact a lot of people would have thought, well, that really wasn't something that was polluting the environment. All that was required was a little bit of clean-up. Some people did feel that way.
"Q. I'm directing at underwriting, so is it fair to say something that came up, perhaps, through a commode and got on the ground, those people who believed sewage wasn't a pollutant, if you will, the reason for it was because it was sewage in a house and it really didn't affect the environment. Is that fair analysis of their —
"A. Something that really didn't affect the environment, yes, I would say so.
"Q. That's *a fair characterization of the people on that side of the argument*, is that correct?
"A. Yes." (Italics added.)

His testimony shows, in the context of a previous question involving workers' compensation risks, that *he* thought the pollution exclusion should not preclude sewage claims.[9] It also shows that the insured's broker thought that the insured's sister company, the "remediation" company, was indeed subject to the pollution exclusion.[10] As noted above, opinion evidence cannot establish coverage.

6. *Fact as framed in the petition for rehearing*: "Northern knew the pollution exclusion did not bar coverage for property damage claims caused by sewage in connection with the South Coast project because Northern issued a Certificate of Insurance naming Griffin and South Coast as insured in connection with liabilities on that

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[9] "Q. DID *YOU HAVE AN UNDERSTANDING* AS TO WHY NORTHERN WAS CONCERNED ABOUT MINGLING EMPLOYEES FROM GRIFFIN REMEDIATION COMPANY TO THE GRIFFIN DEWATERING COMPANY?

"A. THERE WERE -- WELL, THE INSURANCES THAT WE WOULD PROVIDE, WE WOULD -- *WE NEED TO COVER THE WORKERS OF THE COMPANY; SO YOU HAVE WORKERS' COMPENSATION*. SO FOR THEIR HEALTH AND WELFARE THERE WOULD BE, YEAH, WORKERS' COMPENSATION. SO THERE WAS AN EMPLOYEE ASPECT OF COVERAGE. THEN WE'D BE INSURING THE AUTOMOBILES, THE CONTRACTOR'S EQUIPMENT, THE BUILDINGS, THE PERSONAL PROPERTY. BUT THEN ALSO THERE WOULD BE THEIR OPERATIONS AND THERE WOULD BE WHAT WE CALL GENERAL LIABILITY COVERAGE, THIRD-PARTY LIABILITY, SO THAT IF THEY WERE -- COVER THEIR NEGLIGENT ACTS TO THIRD PARTIES IF THEY WERE TO BE SUED. BUT FROM THE EMPLOYEE STANDPOINT, THE NORTHERN IN THIS CASE WAS CONCERNED THAT, WELL, IF EMPLOYEES WENT OVER TO THE REMEDIATION COMPANY, THAT THEY WOULD BE SUBJECTED TO THINGS THAT THEY DIDN'T CONSIDER FROM AN UNDERWRITING STANDPOINT. THEY WOULD BE EXPOSED TO CONTAMINATED MATERIALS AND SO FORTH THAT COULD PRESENT HEALTH HAZARDS AND INJURE THOSE WORKERS, AND THEY DID NOT CONTEMPLATE THIS; SO THEY DID NOT WANT TO BE INVOLVED IN THAT TYPE OF A SITUATION. SO THAT WAS FROM THE -- FROM THE EMPLOYEE HEALTH STANDPOINT.

"Q. *FROM YOUR POINT OF VIEW, MR. HARRISON*, WAS THE UNDERWRITING INTENT OF ENDORSING OR ATTACHING THE TOTAL POLLUTION EXCLUSION ENDORSEMENT TO THE C.G.L. POLICY, WAS THAT TO EXCLUDE COVERAGE FOR SEWAGE-RELATED CLAIMS?

"A. NO." (Italics added.)

[10] "BY MR. WILLIAMS: Q. THIS AGAIN IS FROM YOUR EARLIER DEPOSITION, MR. HARRISON.

'QUESTION: IS IT FAIR TO SAY, THEN, NOBODY DISCUSSED WITH YOU A POTENTIAL REDUCTION OF COVERAGE IN THE EVENT OF AN ENVIRONMENTAL EVENT, ANYBODY AGAIN FROM THE MARYLAND, NORTHERN INSURANCE, ZURICH, GOW AND HANNAH?

'ANSWER: THE ONLY RECOLLECTION I HAVE IS THAT THE MARYLAND WAS NOT A COMPREHENSIVE POLICY WITH THE REMEDIATION AND WANTED AN EXCLUSION IN THE POLICY TO DEAL WITH THAT.'

"MR. MAZZOCONE: IT SAYS COMPREHENSIBLE.

"MR. WILLIAMS: I'M SORRY, YOU'RE ABSOLUTELY RIGHT. I MISREAD THAT. 'THE *ONLY RECOLLECTION* I HAVE IS MARYLAND WAS NOT A COMPREHENSIBLE POLICY WITH THE *REMEDIATION AND WANTED AN EXCLUSION IN THE POLICY TO DEAL WITH THAT*.'" (Italics added.)

project, which dealt exclusively with sewage. (13 RT 2710-11; 17 AA 4178, 4181 (Certificate of Insurance)).”

Reason not included in the original opinion: The record reference to pages 2710 to 2711 of the reporter’s transcript is to testimony of Robert Gokoo, an attorney representing the district, which simply establishes that the district was itself an additional insured on the policy.[11] The record reference to page 4178 is to Griffin’s proposal to do work for the district, and the reference to page 4181 is to the certificate of insurance that said: “South Coast Countys Water District is hereby added as an additional insured. . . .” None of this shows that the insurer intended that the pollution exclusion ever applied to sewage claims.

7. *Fact as framed in the petition for rehearing*: “Following Northern’s initial denial, Bill Harrison (Griffin’s insurance broker since 1987 who negotiated and placed the policy) directed one of his brokerage’s attorneys in its environmental division, Brett Reich, to prepare and send a written legal opinion to Northern (13 RT 2599) setting forth (1) caselaw holding that sewage claims were not barred by the pollution exclusion;

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[11] “Q. CAN YOU PLEASE IDENTIFY IT FOR THE COURT.
“A. YES. THIS IS A COMPLAINT THAT I PREPARED ON BEHALF OF MY CLIENT, SOUTH COAST WATER DISTRICT, WHICH WAS FILED ON SEPTEMBER 9, 1999.
“Q. OKAY. CAN YOU TELL ME -- IT APPEARS AS THOUGH YOU SUED GRIFFIN DEWATERING CORPORATION AND NORTHERN INSURANCE COMPANY OF NEW YORK. DO YOU SEE THE DEFENDANTS THERE AT THE TOP?
“A. THAT IS CORRECT.
“Q. CAN YOU EXPLAIN TO THE COURT HOW IT WAS THAT YOU HAD THE ABILITY TO SUE NORTHERN INSURANCE COMPANY OF NEW YORK DIRECTLY ARISING OUT OF THIS CHAIN OF EVENTS AND SET OF EVENTS?
“A. YES, I CAN. IF YOU LOOK AT EXHIBIT A TO THE COMPLAINT, I HAVE THE ACCORD FORM, WHICH WAS ATTACHED AS EXHIBIT A, AND IT IDENTIFIES NORTHERN INSURANCE COMPANY OF NEW YORK AS THE COMPANY PROVIDING GENERAL LIABILITY. THE ACCORD FORM, THE CERTIFICATE OF INSURANCE --
“Q. IT LOOKS LIKE WE HAVE TWO EXHIBIT A’S TO THE COMPLAINT.
“A. IT’S ALL EXHIBIT A. IT’S THE PAGE -- THEORETICALLY PAGE -- ONE MOMENT. PAGE 4 OF EXHIBIT A.
“Q. CAN YOU EXPLAIN TO THE COURT WHAT AN ACCORD FORM IS, MR. GOKOO, OR --
“A. THE ACCORD FORM HAS BEEN IN THE INSURANCE INDUSTRY FOR SEVERAL YEARS TO MY RECOLLECTION. AND IT IDENTIFIES THE VARIOUS COMPANIES IN THE UPPER RIGHT-HAND CORNER WHO ARE AFFORDING COVERAGE TO THE NAMED INSURED, WHICH IS LOCATED OVER ON THE LEFT-HAND SIDE OF THE DOCUMENT, UPPER SIDE. AND THEN DOWN BELOW IT PROVIDES A DESCRIPTION OF THE -- *WHO IS IDENTIFIED AS AN ADDITIONAL INSURED, WHICH IN THIS CASE IS SOUTH COAST COUNTY WATER DISTRICT, WHICH IS ALSO SOUTH COAST WATER DISTRICT*.” (Italics added.)

and (2) an explanation why the exclusion did not bar the Waters claim, hence demonstrating a potential for coverage. (13 RT 2595-98, 2675, Exh. 74) The reasons Reich detailed included: . . . ." We omit the details of the argument set forth in the letter.

Reason not included in the original opinion: A letter from the insured's broker in 1996, more than seven years prior to the *MacKinnon* decision, making the legal case for coverage does not *necessarily* show that the insurer's position was unreasonable. It only shows that the insurer was exposed to some of the insured's arguments in favor of coverage.

8. *Fact as framed in the petition for rehearing*: "At trial, Tom Lysaught (Director of Northern's Environmental Claims Unit who participated in the denial of Griffin's claim) conceded that the Reich's memorandum 'was correct' because (1) sewage is not necessarily a pollutant; (2) the pollution exclusion applies only to environmental harm; and (3) the exclusion is ambiguous (18 RT 3572, 3568-69), thus confirming Northern's awareness of a potential for coverage, requiring a defense."

Reason not included in the original opinion: The record reference to pages 3568 through 3569 of the reporter's transcript do *not* show that Lysaught admitted that he thought it was ambiguous from the beginning; they only show that he recognized that *courts* had disagreed about application of the exclusion. Indeed, far from thinking that the broker's letter was correct, the transcript shows that he continued to think it incorrect.[12] The record reference to page 3572 of the reporter's transcript simply shows

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[12] "Q. MR. LYSAUGHT, I BELIEVE THIS -- YOU TESTIFIED THIS IS THE LETTER THAT YOU REVIEWED WHICH WAS SENT BY GRIFFIN'S BROKER?
"A. RIGHT.
"Q. APPEALING THE DENIAL OF THE WATERS' CLAIM, CORRECT?
"A. CORRECT.
"Q. AND THIS -- I THINK *YOU CALLED IT AN ADVOCACY PIECE*?
"A. CORRECT.
"Q. IT SETS FORTH REASONS WHY THE CLAIM SHOULD HAVE BEEN COVERED; IS THAT CORRECT?
"A. RIGHT.
"Q. AND THE FIRST HEADING, IT SAYS 'SEWAGE IS NOT A WASTE AS DEFINED IN THE GENERAL LIABILITY POLICY.' LET ME TAKE A STEP BACK. INDEED, YOU DID REVIEW THIS, RIGHT, MR. LYSAUGHT?
"A. YES.

while Lysaught recognized that the *MacKinnon* opinion had *ultimately* vindicated the broker's position, there were "other cases" that had taken the insurer's side.[13]

9. *Fact as framed in the petition for rehearing*: "Harrison testified that, when Griffin's policy came up for renewal, he voiced concern to Lynch about renewing with Northern. Harrison did so because Northern had denied the Water's sewage claim because, as Lynch told Harrison, Northern "did not want to set precedent" given that there were 'many, many other' such claims. (13 RT 2612) But Lynch assured Harrison that if Griffin renewed, he would 'come to Houston' (13 RT 2611), 'look [Griffin's principals] in the eye' (*id*.) and tell them that "[Northern] would agree to cover the – any similar-type sewage backup claims going forward" (*id*.)."

Reason not included in the original opinion: Pages 2610 through 2612 of the reporter's transcript is simply the broker's testimony that the insurer was willing to cover future sewage claims *after* the Waters claim.[14] This part of the case was well

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"Q. *YOU DISAGREE WITH THAT HEADING, RIGHT*?
"A. *I DID AT THE TIME, YES, AND I DO TODAY.*
"Q. OKAY. AND, MR. LYSAUGHT, DO YOU RECALL REVIEWING THAT PARTICULAR HEADING?
"A. YES.
"Q. AND DO YOU DISAGREE WITH THAT?
"A. WELL, I AGREE THAT IN THE EAST QUINCY CASE THEY DID HAVE A DIFFERENT DEFINITION OF POLLUTANTS. THAT CASE ALSO CITED TO A *MICHIGAN CASE, WHICH DID FIND RAW SEWAGE WAS A POLLUTANT*." (Italics added.)

[13] "Q. ISN'T IT ALSO A FACT THAT CLAIMS ARE COVERED, *THE CLAIMS WERE DEEMED COVERED BY JUDGE HAYES*?
"A. YES, THEY WERE.
"Q. SO DIDN'T AON ACTUALLY GET THE APPROPRIATE INSURANCE POLICY FOR GRIFFIN TO HAVE A COVERED CLAIM?
"A. RIGHT. *IN LIGHT OF MACKINNON, YES*.
"Q. SO I'M A LITTLE PERPLEXED WHY THEN PERHAPS THE BROKER DID SOMETHING INCORRECTLY.
"A. I DIDN'T SAY THE BROKER DID ANYTHING INCORRECTLY. *I'M SAYING THE BROKER CITED SELECT CASES IN SUPPORT OF THEIR ARGUMENTS, NOT THE OTHER CASES THAT WENT THE OTHER WAY THAT I'M SURE THEY WERE AWARE OF*.
"Q. THE BROKER WAS CORRECT IN THIS PARTICULAR INSTANCE, THOUGH, CORRECT?
"A. YES." (Italics added.)

[14] "Q. OKAY. NOW, YOU JUST TESTIFIED THAT IN YOUR DISCUSSIONS WITH MR. LYNCH, THAT HE INDICATED TO YOU, OR YOU WERE LEFT WITH THE UNDERSTANDING RATHER, THAT THERE WAS A BIGGER PICTURE INVOLVED, AND THAT'S WHY HE COULDN'T ACCOMMODATE YOU WITH REGARD TO YOUR APPEALS OF THEIR DENIAL OF THE WATERS CLAIM. CAN YOU EXPLAIN TO THE COURT WHAT YOU MEANT BY 'THERE'S A BIGGER PICTURE INVOLVED'?
"MR. WILLIAMS: OBJECTION, YOUR HONOR. CALLS FOR SPECULATION.
"THE COURT: I'M SORRY. I WAS MULTITASKING.

covered in the original opinion explaining the parties' disagreement over the scope of the Houston Oral Promise.

10. *Fact as framed in the petition for rehearing*: "Harrison testified that at the Houston meeting, Lynch stated Northern was 'sorry that the Waters claim had not been covered' (13 RT 2623-24) but in promising 'to cover [sewage claims] going forward,' Lynch meant that '[Northern's] underwriting intent all along [including under the 1996 policy] . . . never contemplated not covering . . . sewage backup claims' (13 RT 2612) that and Lynch 'intended to cover these types of claims all along.['] (13 RT 2614)."

Reason not included in the original opinion: Pages 2623 through 2624 of the reporter's transcript simply recount Lynch's attendance at the meeting giving rise to the Houston Oral Promise.[15] It does not follow that because Lynch "was apologizing" for

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"MR. MAZZOCONE: MAYBE I SHOULD REPEAT THE QUESTION.
"THE COURT: I'VE GOT IT RIGHT HERE. LET ME READ IT. SUSTAINED. NO FOUNDATION.
"Q. BY MR. MAZZOCONE: DID YOU HAVE AN UNDERSTANDING OF WHAT MR. REICH MEANT WHEN HE TOLD YOU THAT THERE WAS A BIGGER PICTURE INVOLVED?
"MR. WILLIAMS: OBJECTION. IRRELEVANT AND NO FOUNDATION.
"THE COURT: SUSTAINED. NO FOUNDATION.
"Q. BY MR. MAZZOCONE: IN YOUR CONVERSATIONS WITH MR. LYNCH, MR. HARRISON, WERE YOU ENDEAVORING TO OBTAIN ASSURANCES FROM MR. LYNCH THAT GRIFFIN WOULD *NO LONGER* HAVE THIS PROBLEM WITH THE DENIAL OF SEWAGE-RELATED CLAIMS UPON RENEWAL IF YOU ELECTED TO PLACE GRIFFIN'S COVERAGE WITH THE MARYLAND AGAIN?
"A. YES.
"Q. OKAY. AND DID YOU RAISE THAT CONCERN WITH MR. LYNCH PRIOR TO THE RENEWAL OF THE POLICY IN 1997?
"A. YES, I DID.
"Q. OKAY. DID MR. LYNCH PROVIDE YOU WITH ANY ASSURANCES IN THAT REGARD PRIOR TO THE RENEWAL OF THE POLICY?
"MR. WILLIAMS: OBJECTION. ASKED AND ANSWERED.
"THE COURT: OVERRULED.
"THE WITNESS: YES. MR. -- YEAH, JERRIE LYNCH, YOU KNOW, INDICATED THAT *HE COULD NOT DO ANYTHING ON THE RON WATERS MATTER*, BUT HE WOULD AGREE TO COVER THE -- ANY SIMILAR-TYPE SEWAGE BACKUP CLAIMS *GOING FORWARD*, AND THAT HE WOULD COME TO HOUSTON AND COMMUNICATE THAT TO -- DIRECTLY TO THE GRIFFIN FOLKS BECAUSE I -- I RECALL SAYING TO JERRIE, 'I WANT YOU TO COME TO HOUSTON, I WANT YOU TO LOOK THEM IN THE EYE, AND I WANT YOU TO SAY IT DIRECTLY TO THEM, THAT IT'S YOUR INTENTION TO COVER THESE TYPE OF CLAIMS,' AND HE WAS AGREEABLE TO DO THAT." (Italics added.)

[15] "Q. DID HE COME TO HOUSTON AND ATTEND THE MEETING?
"A. YES, HE DID.
"Q. OKAY. AND CAN YOU TELL THE COURT WHAT THE PURPOSE OF HIS ATTENDING THE MEETING WAS?

the way the Waters claim "went" that the insurer acted unreasonably in denying the defense of that same claim later. Page 2612 recounts the insured's *broker's opinion* that if the insurer was willing to cover sewage claims *after* the Waters claim, then there must have been an underwriting intent "all along" that the sewage claims would be covered. Lynch, however, never said that.[16] Pages 2614 to 2615 similarly recounts what the

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"A. HIS PURPOSE FROM EARLIER WAS TO TALK ABOUT THE POLLUTION CLAIM, COMMUNICATE TO KAZEM KHONSARI AND DAISY SUIT THAT -- YOU KNOW, HE WAS BASICALLY APOLOGIZING THAT -- FOR THE WAY THE RON WATERS MATTER WENT, THAT THERE'S NOTHING HE CAN DO TO ALTER THAT, BUT HE WAS GOING TO COMMUNICATE TO THEM THAT GOING FORWARD THAT SIMILAR-TYPE CLAIMS WOULD BE COVERED.

"Q. OKAY. WHEN YOU SAY "SIMILAR-TYPE CLAIMS," ARE YOU REFERRING TO SEWAGE-RELATED CLAIMS?

"A. THAT'S CORRECT.

"Q. AND YOU SAY HE INDICATED THAT THERE WAS NOTHING HE COULD DO ABOUT THE WATERS CLAIM; IS THAT RIGHT?

"A. THAT'S CORRECT.

"Q. OKAY. SO DID HE -- IN YOUR VIEW, DID HE MAKE IT CLEAR THAT THE -- THAT THE INSURANCE COMPANY WAS NOT GOING TO GO BACK AND PAY THE WATERS CLAIM AT THIS POINT?

"A. I DON'T BELIEVE HE TALKED DIRECTLY TO THAT ASPECT, BUT HE JUST -- YOU KNOW, HE WAS COMMUNICATING THAT THE POLLUTION WOULDN'T -- THE POLLUTION EXCLUSION WOULDN'T BE EXPANDED TO INCLUDE SEWAGE BACKUP CLAIMS ARISING OUT OF BYPASS WORK. THAT WAS THE CRUX OF IT.

"Q. OKAY. AT THE MEETING AFTER MR. -- WHEN MR. LYNCH SPOKE, WERE YOU LEFT WITH THE IMPRESSION THAT SEWAGE-RELATED CLAIMS WERE GOING TO BE COVERED UNDER THE C.G.L. POLICY ISSUED BY NORTHERN TO GRIFFIN?

"A. ABSOLUTELY.

"Q. OKAY. AND DID YOU CONVEY THAT IMPRESSION OR SHARE THOSE IMPRESSIONS WITH YOUR CUSTOMERS, WITH ANYBODY AT GRIFFIN?

"A. YES. I HAD TALKED TO GRIFFIN PRIOR TO THE MEETING, AND I HAD DISCUSSIONS WITH JERRIE AND WE – YOU KNOW, JERRIE CONVEYED THAT THE MARYLAND WOULD PAY THESE TYPE OF CLAIMS GOING FORWARD, THAT WAS PRETTY MUCH A CONDITION TO THE RENEWAL, AND THAT HE WAS WILLING TO COME DOWN TO HOUSTON AND COMMUNICATE THAT DIRECTLY TO THE GRIFFIN DEWATERING FOLKS. AND I HAD COMMUNI -- YOU KNOW, FOLLOWING THOSE DISCUSSIONS, I HAD SPOKE TO DAISY SUIT AND, YOU KNOW, PRIOR TO THE RENEWAL AND EXPLAINED THIS, AND THAT WAS A SATISFACTORY CONDITION THAT AS LONG AS THEY WERE GOING TO CORRECT IT AND GOING FORWARD WITH THE COVERAGES AND THE PRICING BEING PROPER WOULD, YOU KNOW, BE APPROPRIATE PLUS THAT ISSUE THEY WOULD AGREE TO RENEW. SO THAT WAS DONE PRIOR TO THE MEETING."

[16] "Q. BY MR. MAZZOCONE: AND DURING THAT CONVERSATION, DID MR. LYNCH EXPLAIN TO YOU WHY HE WAS OR RATHER THAT NORTHERN WAS UNWILLING TO DO ANYTHING ABOUT THE WATERS CLAIM AS YOU PUT IT?

"MR. WILLIAMS: OBJECTION. ASKED AND ANSWERED.

"THE COURT: OVERRULED.

"THE WITNESS: YEAH. JERRIE INDICATED THAT THERE -- THE MARYLAND DID NOT WANT TO SET PRECEDENT, THAT THERE WERE MANY, MANY OTHER CLAIMS AND THAT HE COULD NOT INTERFERE.

"Q. BY MR. MAZZOCONE: OKAY. NOW, WHEN YOU SAY THAT MR. LYNCH DID NOT -- TOLD YOU THAT HE DID NOT WISH TO OR THE COMPANY DID NOT WISH TO SET PRECEDENT, *DID YOU*

broker thought Lynch thought, not what *Lynch actually thought*.[17] Obviously the fact that a broker thought that an employee of an insurance company thought that a particular exclusion should not apply in a given instance is not substantial evidence that the insurer itself never intended the exclusion should apply.

11. *Fact as framed in the petition for rehearing*: "Harrison, Kazem Khonsari (Griffin's President) and Eric McAnelly (Griffin's in-house counsel) understood Lynch's statements in Houston to mean that given the parties' underwriting intent, Northern would 'at least defend the action' arising from the Waters claim. (13 RT 2629, 15 RT 3002, 15 RT 3007; 14 RT 2814)."

Reason not included in the original opinion: The record references simply recount why the insured re-submitted a request for a defense of the district's suit. Page 2629 shows that the broker thought it was worth "another run,"[18] pages 3001 and 3002

FORMULATE AN UNDERSTANDING OF WHAT HE MEANT BY THAT?

"MR. WILLIAMS: OBJECTION. CALLS FOR SPECULATION AND IRRELEVANT.

"THE COURT: OVERRULED.

"THE WITNESS: YES. *TO ME* JERRIE WAS SAYING THAT -- YOU KNOW, IF YOU'RE AGREEING TO COVER GOING FORWARD, THEN *TO ME* THAT MEANS THERE'S AN UNDERWRITING INTENT ALL ALONG." (Italics added.)

[17] "Q. BY MR. MAZZOCONE: MR. HARRISON, DID YOU HAVE DISCUSSIONS WITH MR. LYNCH AT THAT TIME WITH REGARD TO HIS CONCERNS OR RATHER THE COMPANY'S CONCERNS ABOUT HONORING THE WATERS CLAIM?

"MR. WILLIAMS: OBJECTION. ASKED AND ANSWERED TWICE NOW.

"THE COURT: OVERRULED.

"THE WITNESS: YES. THE -- JERRIE, *IN MY MIND*, HAD INTENDED TO COVER THESE TYPE OF CLAIMS ALL ALONG. HOWEVER, HE WAS -- YOU KNOW, THE MARYLAND HAD MADE – TOOK A POSITION, HE COULD NOT ALTER THAT POSITION, AND – BUT HE WAS APOLOGETIC AND SAID THAT WE CAN -- YOU KNOW, GOING FORWARD WE CAN BE CLEARER AND AGREE TO COVER THOSE TYPE OF CLAIMS.

"MR. WILLIAMS: MOVE TO STRIKE THE FIRST PART OF THE ANSWER ABOUT HIS SPECULATION, AND NO FOUNDATION ABOUT WHAT JERRIE INTENDED ALL ALONG.

"THE COURT: OVERRULED." (Italics added.)

[18] "Q. WHY DID YOU WANT TO SUBMIT IT TO MARYLAND CASUALTY?

"A. BECAUSE, YOU KNOW, WE STILL FELT THERE WAS -- THERE WAS COVERAGE AND THE FEELING THAT HERE'S THE -- HERE'S THE LAWSUIT. IT'S -- NOW THE CLAIM HAS RESURFACED IN THE FORM OF A LAWSUIT. LET'S SEND IT TO THEM. *LET'S TAKE ANOTHER RUN AT IT AGAIN*. NOW IT'S A FORMAL COMPLAINT. AND, YOU KNOW, WE HAD THE BRET REICH LETTER. WE HAD THE SUPPORTING DOCUMENTATION THAT WE FELT FROM A LEGAL STANDPOINT THAT IT SHOULD BE COVERED. BUT, MORE IMPORTANTLY, AT THIS POINT THERE'S A -- THERE'S A -- YOU KNOW, A QUESTION OF FACT IN THAT THE MARYLAND SHOULD, AT A MINIMUM, ACCEPTED AND DEFEND ON THEIR -- AND DEFEND THE CASE, BECAUSE A DUTY TO DEFEND IS GREATER THAN THE DUTY TO INDEMNIFY. SO WE FELT THAT WE SHOULD SUBMIT IT AND THEY WOULD AT LEAST DEFEND THE ACTION AND WE CAN GO FROM THERE." (Italics added.)

show the insured's president's recollection of the Houston Meeting[19] that the insured would not assert the exclusion if anything in the future happened, page 3007 is to the same effect, except there the insured's president was under cross-examination,[20] and page 2814 was the testimony of a contract administrator working for the insured who also recounted the Houston meeting as one in which it was agreed that, if any sewage claims arose in the future, they would be covered.[21] The topic of the Houston Meeting was well covered in the original opinion, and in fact the main reason the case took so long.

12. *Fact as framed in the petition for rehearing*: "During the Houston meeting, Khonsari 'specifically asked [Lynch] if anything comes from South Coast are

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[19] Picking up the testimony from the previous page:
"Q. THIS WAS A MEETING BACK IN 1997. THIS WAS EIGHT, NINE YEARS AGO.
"A THAT'S CORRECT.
"Q. IN FACT, IN TERMS OF WHEN THE TESTIMONY – OR WHEN THE DISCUSSION TOOK PLACE WITH JERRIE LYNCH, YOU DON'T ACTUALLY REMEMBER WHETHER THAT WAS IN THE MORNING PART OF THE MEETING OR AT LUNCH OR IN THE AFTERNOON PART OF THE MEETING; IS THAT CORRECT?
"ALL I REMEMBER FROM MR. JERRIE LYNCH, I SHAKE HIS HAND. HE WAS INTRODUCED TO ME. AND BASICALLY WENT OVER THE -- BASICALLY OUR BUSINESS. I INVITE THEM IF THEY LIKE TO SEE OUR OPERATION, WHICH IS RIGHT THERE, AND HAVE SOME EXPLANATION ABOUT THE DENIAL OF THE CLAIM. AND HIS RESPONSE -- HIS ASSURANCE TO ME, NOT ONLY ONE TIME, NOT ONLY TWO TIMES, ON THE WAY GOING OUT AGAIN, WE SHAKE, MY UNDERSTANDING FROM WAS HIM IS DO NOT WORRY ABOUT WHAT'S HAPPENING. IN THE PAST I CANNOT GO BACK TO IT. BUT IF ANYTHING HAPPENED *IN THE FUTURE*, YOU'RE COVERED. THAT'S ALL I WAS INTERESTED IN." (Italics added.)

[20] "BY MR. WILLIAMS: Q. IS IT ALSO TRUE THAT YOU CAN'T REMEMBER THE SPECIFICS OR THE DETAILS ABOUT WHAT MR. LYNCH ACTUALLY SAID TO YOU?
"A. YOU'RE QUESTIONING ME?
"Q. IS IT TRUE, MR. KHONSARI, THAT YOU CAN'T REMEMBER THE SPECIFICS OR THE DETAILS ABOUT WHAT MR. LYNCH ACTUALLY SAID TO YOU?
"A. I REMEMBER VERY CLEARLY MY CONCERN WAS -- FROM THAT MEETING IS WE HAVE A COVERAGE OR WE DON'T HAVE A COVERAGE FOR THE POLICY I BOUGHT. HE WAS SYMPATHIZED AND SORRY ABOUT WHAT HAPPENED. HE COULDN'T -- THEY DENIED IT HAD HAPPENED. HE COULDN'T DO ANYTHING ABOUT IT. BUT HE ASSURED ME THAT WOULDN'T BE HAPPENING IN THE FUTURE, AND I'M COVERED. AND THIS -- ALL I WAS TRYING TO GET OUT OF THE MEETING, I WANT TO BE SURE I HAVE INSURANCE, I CAN GO OUT, GET THE BUSINESS. I DON'T REMEMBER ALL THE DETAILS WHAT HAS BEEN DISCUSSED, WHAT SPECIFIC, WHAT SENTENCE, WHERE THE PEOPLE SITTING AT AND SO ON."

[21] "Q. I THINK YOU SAID IN A PRETTY CLEAR AND STRAIGHTFORWARD WAY THAT WHAT JERRIE LYNCH SAID AT THE HOUSTON MEETING WAS THAT NORTHERN WAS NOT GOING TO HONOR THE WATERS CLAIM BECAUSE OF THIS EXCLUSION, BUT THAT FUTURE CLAIMS OF THE SAME SORT WOULD BE HONORED. IS THAT A FAIR ASSESSMENT?
"A. WHAT I UNDERSTOOD MR. LYNCH WAS SAYING IS THE CLAIM, THE WATERS CLAIM AT THIS POINT, WAS QUIET; *WE WEREN'T GOING TO GO BACK AND REVISIT IT*. BUT ANY CLAIM THAT CAME *IN THE FUTURE* THAT INVOLVED SEWAGE, NORTHERN WOULD HONOR." (Italics added.)

we covered, and the answer was yes.' (15 RT 3019) Lynch responded that 'anything that developed out of the Waters' claim would be covered in the future.' (15 RT 3022) 'The main issue [Khonsari] was concerned about was our coverage about this sewage bypass.' (15 RT 3005) Lynch 'understood' his concern, 'assured [Khonsari] and [shook his] hand [saying] 'that won't be happening in the future, go on with your business. You're covered. Don't worry about it anymore."' (15 RT 3009)."

Reason not included in the original opinion: The opinion goes to some length to explain why the court could not affirm the judgment based on the Houston Oral Promise. (See slip. op. at pp. 38-39.) As the original opinion notes, had the insured added a cause of action based on the Houston Oral Promise, the conflict over whether the district's suit on the Waters claim was a "future" suit within the meaning of the Houston Oral Promise would have been resolved in the insured's favor.

13. *Fact as framed in the petition for rehearing*: "McAnelly, who attended the Houston meeting, had the same understanding from Lynch as Khonsari -- that Northern would provide coverage for any claims related to the Waters incident in the future. If the Waters claim suddenly 'c[a]me back to life the week after the Houston meeting,' Northern would have 'paid [it].' 'That's what I understood' at the 1997 Houston meeting. (14 RT 2814) (This testimony went unrebutted at trial; Northern presented no employee who attended the 1997 Houston meeting.)."

Reason not included in the original opinion: As with the previous fact, the original opinion recognizes that the insured's side of the Houston Oral Promise was that the Waters claim would be covered if it iterated itself in the form of a future suit against the insured. (See slip op. at p. 3.) However, as the original opinion also explains, the insured elected to forego liability on a breach of the Houston Oral Promise and focus on liability under the written insurance contract. (See slip op. at pp. 17-19, 38-39.)

14. *Fact as framed in the petition for rehearing*: "Northern knew that South Coast's complaint alleged a claim for 'property damage' within the meaning of the insuring clause of Northern's policy (17 AA 4156-77), thereby raising a potential for

coverage Northern could not conclusively eliminate based on a dispute regarding the pollution exclusion's applicability -- thus requiring Northern to defend."

Reason not included in the original opinion: The swath of pages cited is to the complaint by the district against the insured. This "fact" is little more than a legal argument.

15. Fact as framed in the petition for rehearing: "Northern knew there was no California caselaw interpreting the pollution exclusion (15 AA 3668; 18 RT 3600) and hence no California law support for Northern's position that the exclusion was unambiguous and barred Griffin's claim."

Reason not included in the original opinion: As explained in the original opinion, the absence of direct Supreme Court authority supporting the application of an exclusion to a given suit does not necessarily show that the application of the pollution exclusion to sewage is *unreasonable*. The original opinion also notes that at least two panels of the Court of Appeal, prior to *MacKinnon*, took a broad view of the total pollution exclusion.

16. *Fact as framed in the petition for rehearing*: "Northern knew that *actual* coverage existed, since when Griffin was sued in an earlier case ('City of Vista') in which sewage had spilled into a lagoon, Northern agreed to defend Griffin even though the policy contained a pollution exclusion containing the same definition of 'pollutant' as in the policy at issue here. (4 AA 829, 901, 905; RA 109; RA 6-7, 102-05)"

Reason not included in original: The record reference to page 829 of the appellant's appendix is simply to the cover page of a reply by the insurer in a summary adjudication motion in 2003. Pages 901 and 905 of the appellant's appendix are to a letter *from AIG*, which, while too long to reproduce verbatim, does not mention any City of Vista claim. Pages 6 and 7 of the Respondent's Appendix are from the insured's own in limine motion to exclude evidence that the insurer's policy was anything but primary. Page 6 is from the supporting points and authorities asserting that the insurer had agreed to honor a *1998 request* to defend a suit (not exactly an "earlier" case – recall that the Houston Meeting -- where everyone agreed that the company would cover all future

sewage claims -- was in May 1997) involving the City of Vista. That case involved a sewage spill from drilling into a pipeline.[22] Pages 102 to 103 of the Respondent's Appendix is a letter from the insured's contract administrator referencing the City of Vista suit. While the letter is too long to reproduce, we see nothing in it that the insured made a request for a defense in that suit *prior* to the 1997 Houston Meeting. The only date given about that suit, given on the first page of the letter, is to March 5, 1998, again, after the Houston Meeting had generated a promise that future claims (at least future non-Waters claims) would be covered. Page 109 is from an internal memo within the insurer about the City of Vista claim. Nothing in the memo contravenes the insured's own pleadings that the request for a defense in the City of Vista case came in 1998.

[22] The bottom two paragraphs on page 6 of the points and authorities state:

"In 1998, Griffin tendered defense of a case called Pascal & Ludwig v. City of Vista to Northern. In that case, it was alleged that Northern drilled into a pipe causing sewage to spill. (Cronin Decl. ¶5, Ex. D.) The CGL policy issued by Northern relevant there, as in the instant lawsuit, contained a TPE. (Cronin Decl. ¶5, Ex. D.) Northern agreed to defend Griffin in the City of Vista case but, like it has done in this case, Northern attempted to argue that the AIG Policy was primary to avoid paying defense costs. (Cronin Decl. ¶5 Ex. D.)

"On May 28,1998, Denise Speer, Northern's claims supervisor in the pollution unit, sent a memo to Vaneta Gibson, the adjuster on City of Vista and Waters Claim/South Coast Lawsuit files, regarding the alleged apportionment of defense costs stating "[t]he strategy will be to convince AIG that they have primary coverage as well. If they do not agree, then we may have full primary exposure up to our policy limit." (Cronin Decl. ¶6, Ex. E.)"